LOOI GNAN PENG

v.

BAY TONG HAI

COURT OF APPEAL, PUTRAJAYA
AHMAD FAIRUZ CJ
RICHARD MALANJUM JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NO: P-04-77-2002]
3 DECEMBER 2004

DAMAGES: *Personal injuries - Loss of future earnings - Proof - That plaintiff was in good health but for the injury - Whether plaintiff's injuries prevented her from continuing in her occupation - Whether plaintiff showed how long she would have been employed but for the injury - Whether claim for loss of future earnings included in pleadings - Civil Law Act 1956, s. 28A(2)(c)(i)*

CIVIL LAW ACT: *Damages - Loss of future earnings - Proof - That plaintiff was in good health but for the injury - Whether plaintiff's injuries prevented her from continuing in her occupation - Whether plaintiff showed how long she would have been employed but for the injury - Whether claim for loss of future earnings included in pleadings - Civil Law Act 1956, s. 28A(2)(c)(i)*

This was an appeal from the decision of the High Court affirming the order of the Sessions Court disallowing the plaintiff's claim for loss of future earnings. (The High Court, however, had increased the multiplicand used by Sessions Court's in assessing special damages for the plaintiff for loss of actual earnings and partial loss of actual earnings.) The narrow point that fell for determination before the justices of appeal herein centred on the evidentiary requirements of s. 28A Civil Law Act 1956 ('the Act'), in particular sub-s. (2)(c)(i) thereof respecting the considerations in awarding and assessing damages for loss of future earnings. For the plaintiff, it was contended that as a result of the injuries to her left leg – which included a fractured tibia and fibula (1/2cm shortening), lacerations, scars, permanent deformities and a stiff ankle which restricted her ability to squat or dance – she was unable to continue in her occupation as a guest relations officer in a Karaoke lounge.

Held (dismissing the plaintiff's appeal)
Per Richard Malanjum JCA delivering the judgment of the court:

[1] The plaintiff's claim for loss of future earnings must plainly fail because she was not able to satisfy the basic evidentiary requirements of s. 28A(2)(c)(i) of the Act, *ie*, proof that she "was in good health but for the injury". The plaintiff was unable to show how long or permanent she would be in employment as a Karaoke guest relations officer if not for the injury. Indeed, a claim for special damages must be proved. Further, the plaintiff was also unable to establish that her inability to dance after the accident had indeed prevented her from continuing in such employment. The plaintiff's evidence simply did not prove that her work as a Karaoke guest relations officer required, or even permitted, her to dance with the patrons thereat. (pp 690 h, 691 a-h, 692 a, g-h & 693 a, e)

[2] The plaintiff also did not specifically plead loss of future earnings as part of her claim. (pp 693 b, e)

[Each party to bear own costs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi kerana mengesahkan keputusan Mahkamah Sesyen yang menolak tuntutan plaintif untuk gantirugi bagi kehilangan pendapatan masa depan. (Mahkamah Tinggi bagaimanapun telah menambah angka pendarab yang digunakan oleh Mahkamah Sesyen dalam menilai gantirugi khas kepada plaintif berhubung kehilangan pendapatan sebenar dan kehilangan sebahagian dari pendapatan sebenar). Satu-satunya halperkara yang memerlukan keputusan hakim-hakim rayuan di sini adalah mengenai kehendak-kehendak keterangan s. 28A Akta Undang-Undang Sivil 1956 ('Akta'), terutama sub-seksyen 2(c)(i)nya, berkaitan dengan pertimbangan-pertimbangan yang perlu diambil kira dalam mengaward dan menilai gantirugi kerana kehilangan pendapatan masa depan. Bagi pihak plaintif, ianya dihujahkan bahawa, akibat dari kecederaan pada betis kirinya – yang termasuk retak pada tulang kering dan tulang betis (kependekan 1/2 cm), luka-luka, parut, kecacatan kekal dan kekakuan di pergelangan kaki yang menyekat keupayaannya untuk bertinggung atau menari – beliau tidak mampu untuk terus bekerja sebagai pegawai perhubungan pelanggan di sebuah pusat karaoke.

Diputuskan (menolak rayuan plaintif)
Oleh Richard Malanjum HMR menyampaikan penghakiman mahkamah:

[1] Tuntutan plaintif kerana kehilangan pendapatan masa depan jelas gagal kerana beliau tidak memuaskan kehendak asas keterangan s. 28A(2)(c)(i) Akta, iaitu, membuktikan bahawa beliau "berada dalam keadaan sihat walafiat jika tidak kerana kecederaan". Plaintif gagal membuktikan berapa lamakah atau setetap manakah beliau akan bekerja sebagai pegawai perhubungan pelanggan di Karaoke tersebut jika tidak kerana kecederaan yang dialami. Sememangnya, sesuatu tuntutan untuk gantirugi khas mesti dibuktikan. Selain itu, plaintif juga gagal membuktikan bahawa ketidakupayaannya untuk menari selepas kemalangan telah sesungguhnya menghalang beliau dari meneruskan kerjayanya itu. Keterangan plaintif tidak langsung menunjukkan bahawa pekerjaaannya sebagai seorang pegawai perhubungan pelanggan Karaoke memerlukan, atau malah membenarkannya, menari dengan pelanggan-pelanggan di situ.

[2] Plaintif juga tidak secara khusus memplid kehilangan pendapatan masa depan sebagai sebahagian dari tuntutannya.

[Pihak-pihak menanggung kos masing-masing.]

Case(s) referred to:
Chan Chin Ming & Anor v. Lim Yok Eng [1994] 3 CLJ 687 SC ***(refd)***
Chong Khee Sang v. Pang Ah Chee [1984] 1 MLJ 377 ***(refd)***
Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor and Another Appeal [2004] 1 CLJ 797 CA ***(refd)***
Ng Bee Lian v. Fernandez & Anor [1994] 2 SLR 633 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28A(2)(c), (d)

For the appellant/plaintiff - Rhina Bhar; Rhina Bhar & Assoc
For the respondent/defendant - P Ramanathan; M/s VP Nathan & Partners

[Appeal from High Court, Pulau Pinang; Civil Appeal No: 12-02-1999]

Reported by Gan Peng Chiang

JUDGMENT

Richard Malanjum JCA:

Introduction

This is an appeal against the decision of the High Court affirming the decision of the Sessions Court in disallowing the claim for loss of future earnings by the appellant. That in fact is the only issue for determination in this appeal.

After having heard the oral arguments of learned counsel for the parties we directed them to submit further written submissions to address us on the specific point of law involved, that is, the ambit of s. 28A of the Civil Law Act 1956 (the Act) in relation to loss of future earnings.

On receipt of the respective additional written submissions we took time to consider the opposing contentions. This is therefore the judgment of the court.

Background Facts

But first the facts of the case upon which the claim arose.

On 3 January 1996 the appellant was a pillion rider of a motorcycle bearing registration number PCU 4265 along Jalan Pangkor towards Jalan Gelugor, Penang. On reaching the junction of Jalan Perak and Peel Avenue the said motorcycle was knocked down by a motor car bearing registration number PCF 8923 which was owned and driven by the respondent.

As a result of the collision the appellant suffered injuries, including fractured mid-shaft left tibia and fibula, lacerations on the left leg and left foot. The injuries resulted in the Appellant having her left leg shorter by 1/2 cm. There are also scars on the front and lower portions of her left leg coupled by permanent deformity. Her left ankle has also become stiff and she finds it difficult to fully squat.

Decision Of The Sessions Court

After a full trial the Sessions Court George Town Penang found the Respondent to be 100% liable for the collision. There was no appeal against that finding to the High Court.

In respect of the quantum awarded the Sessions Court allowed the following:

General Damages :

For pain and suffering:

– for the fractured tibia and fibula: RM16,000;

– for the scars: RM2,000; and

– for the other lacerations: RM1,000.

Total sums: RM19,000.

For loss of earnings under the claim for special damages:

– loss of actual earnings: RM31,500

(RM1,500 x 21 months);

– partial loss of actual earnings: RM9,100

(RM700 x 13 months); and

– loss of future earnings: disallowed.

Dissatisfied with the quantum awarded the appellant appealed to the High Court against the earnings multiplicand given as well as the rejection of the claim for loss of future earnings.

Decision Of The High Court

The learned High Court judge partially allowed the appeal in that he increased the earnings multiplicand from RM1,500 to the original figure claimed by the appellant of RM3,120 thereby making the sum awarded for loss of actual loss of earnings to RM65,520 (RM3,120 x 21 months) and the loss of partial earnings to RM30,160 (RM3,120 – RM800 x 13 months). He affirmed the rejection of the claim for loss of future earnings.

This Appeal

The appellant, still dissatisfied with the decision of the learned High Court judge is appealing to this court specifically on the rejection of the claim for loss of future earnings. It is crucial to note that there is no cross-appeal by the respondent against the decision of the learned High Court judge in particular on the increase of the earnings multiplicand or any of the findings of the learned High Court judge.

In order to put the issue in better perspective it is pertinent to recap some of the findings by the Sessions Court in relation to quantum. They are as follows:

(i) that at the time of injury the appellant was working as a Guest Relation Officer with Treasure Corner Karaoke;

(ii) that the salary slips produced by PW6 only recorded the commission payable to the appellant hence they were found to be of recent creation by PW6 to assist the appellant;

(iii) that the reasonable income receivable by the appellant before the injury would be RM1,500 per month;

(iv) that the period of unemployment after the injury was given at 21 months;

(v) that from November 1997 the appellant did work as a sales assistant in the shop of his brother earning RM800 per month;

(vi) that the scope of duty of the appellant as a Guest Relation Officer was only to entertain male customers and not to dance and sing;

(vii) that the main requirement of the appellant as a Guest Relation Officer was to dress sexily;

(viii) that the only complaint of the appellant recorded in the Specialist Report were that she could no longer squat and run but did not complain of being unable to dance;

(ix) that the injuries of the appellant were not serious;

(x) that the appellant does not limp as a result of the injuries;

(xi) that the scars on her left leg could be covered by wearing coloured stockings; and

(xii) that the appellant was giving a grim picture in order to get higher compensation from the Insurance company.

The learned High Court judge while accepting most of the findings of the Sessions Court disagreed with the rejection of the earning figure of RM120 per day as stated in the salary slips produced and asserted by PW6 and the appellant. He was of the view that it was unreasonable to reject the figure of RM3,120 per month as the earnings of the appellant without any evidence to support the figure of RM1,500 per month as determined by the Sessions Court.

However on the claim for loss of future earnings the learned High Court judge affirmed the decision of the Sessions Court on the ground that the employment of the appellant as a Guest Relation Officer was not permanent and that there was no evidence to indicate how long the appellant would be in such employment if not for the injury.

In addition the learned High Court judge concluded that there was no clear evidence adduced to show that Treasure Corner was a karaoke with space to dance and the appellant being duty-bound to dance. He also said that the said karaoke centre did not have a license whereby dancing was permitted. And he accepted the evidence of DW1 who testified that Treasure Corner was only a karaoke centre and not a place for dancing. As such the learned High Court judge rejected the claim by the appellant that she could no longer work in the karaoke due to her inability to dance.

In other words the learned High Court judge did not allow the claim for loss of future earnings mainly because he did not accept the appellant's claim that she could no longer work as a Guest Relation Officer in Treasure Corner on account of her inability to dance since dancing was not one of the activities of the karaoke centre and it was also not part of her duty.

It is therefore a matter of whether the requirements of s. 28A of the Act have been satisfied including proof thereof.

Sub-sections 2(c) and (d) of s. 28A of the Act read:

> (c) in awarding damages for loss of future earnings the Court shall take into account:
>
> (i) that in the case of a plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, *damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;*
>
> (ii) only the amount relating to his *earnings as aforesaid at the time when he was injured* and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;
>
> (iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured;
>
> (d) in assessing damages for loss of future earnings the Court shall take into account that:
>
> (i) in the case of a person who was of the age of *thirty years or below at the time when he was injured, the number of years' purchase shall be 16*; and

(ii) in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2. (emphasis added).

In opposing this appeal learned counsel for the respondent focused his argument mainly on these points, namely:

(a) that the pleading only asked for loss of earnings as Guest Relation Officer and not that her earnings were affected due to inability to dance at the Treasure Corner karaoke;

(b) that the evidence adduced could not support the contention that the appellant was formerly employed as a dancer; and

(c) that there was no evidence adduced to indicate if the appellant was in good health.

In prosecuting the appeal learned counsel for the appellant made a lengthy submission on the law relating to the computation of the years purchase under s. 28A and contended that the majority decision in *Chan Chin Ming & Anor v. Lim Yok Eng* [1994] 3 CLJ 687 was wrongly decided and preferring the decision of this court in *Ibrahim bin Ismail & Anor v. Hasnah bte Puteh Imat (as beneficiary and legal mother of Bakri bin Yahya and substituting Yahya bin Ibrahim) & Anor and Another Appeal* [2004] 1 CLJ 797. It was argued that s. 28A took away the discretion of the court in determining the years purchase. Unfortunately as a result of her preoccupation with the issue learned counsel failed to direct her mind on the basic requirements of the section, that is the various elements therein and the need to prove them.

With respect we are of the view that the years purchase is only one aspect of s. 28A in relation to claim for loss of future earnings. One of the other elements is that 'damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury'.

On perusal of the evidence adduced we are in agreement with learned counsel for the respondent that none of the witnesses called by the appellant including the appellant herself testified on her overall health condition. No doubt in the medical reports it was stated that her general condition was satisfactory or good. But that could only refer to her condition after the accident and not on her overall health. A simple question to the medical doctors called as witnesses on her overall health condition could have resolved the doubt. Since that was

not done we are of the view that one element required for a successful claim remained unproved. And it is settled law that claim for special damages must be proved. (See: *Chong Khee Sang v. Pang Ah Chee* [1984] 1 MLJ 377; *Ng Bee Lian v. Fernandez & Anor* [1994] 2 SLR 633). Accordingly for this reason alone this appeal would have to be dismissed.

On the pleadings point raised it is not entirely without merit. In fact we find no specific plea on loss of future earnings. Further there was also no evidence adduced to indicate at least the probable length of time the appellant would have been employed as a Guest Relation Officer by Treasure Corner. It is not that s. 28A demands such issue to be proved. But that could have been useful as a gauge in the state of her overall health and could have also assisted the Court in determining whether indeed she could no longer perform the task of her previous employment. Instead the reason given for her inability to continue working as a Guest Relation Officer after the collision was her difficulty in dancing and to wear sexy dresses. But these requirements of the work were not pleaded. Meanwhile there was evidence adduced that dancing was not part and parcel of the employment and no license was issued to the employer to allow dancing in the premises.

As such the Sessions Court and the High Court should not be faulted for concluding as they did that the appellant could have continued working as a Guest Relation Officer and hence the issue of loss of future earnings should not arise. On the evidence available we find no cause to differ. In the event the question of assessment of such loss is premature and is a non-issue.

Conclusion

For the above reasons this appeal is dismissed. Although it is axiomatic that costs should follow the event we are of the view that on the facts and circumstances of this case each party should pay its own costs for this appeal. Deposit to be refunded to the appellant.